Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

IN RE: FOUR THREE OH, INC.,

Debtor,

BOARD OF ADJUSTMENT OF THE
TOWNSHIP OF NORTH BERGEN, THE,
Petitioner

v.

B.A.P.S. NORTHEAST, INC.;
MICHAEL B. KAPLAN, Chapter 11 Trustee;
TOWNSHIP OF NORTH BERGEN, THE, a Municipal
Corporation of the State of New Jersey;
FOUR THREE OH CORP.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. May a Court of Appeals substitute its judgment for that of a local Board of Adjustment in finding that it acted arbitrarily and capriciously in refusing to grant a variance?

II. Does Due Process require appellate courts to apply the same standard of review in a particular case at different stages of the proceeding?

LIST OF PARTIES TO THE PROCEEDING

The Petitioner, which was the Defendant below, is the Board of Adjustment of the Township of North Bergen.

The Respondents, who were the Plaintiffs in the District Court action, are B.A.P.S. Northeast, Inc.; Michael B. Kaplan, Chapter 11 Trustee; the Township of North Bergen, a municipal corporation of the State of New Jersey, and Four Three Oh Corporation.

TABLE OF CONTENTS

Questions Presented For Review i

List of Parties to the Proceeding i

Table Of Contents ii

Table Of Authorities iii

Opinions Below 1

Statement Of Jurisdiction 1

Constitutional Provisions 1

Statement Of The Case 2

Argument 7

I. The Third Circuit Misconstured Decisions Of This Court When It Substituted Its Judgment For That Of The Board Of Adjustment In Finding That It Acted Arbitrarily And Capricously 7

II. The Lower Courts Violated Due Process By Applying Different Standards Of Review At Different Stages Of This Case 9

Conclusion 15

TABLE OF AUTHORITIES

Cases

Anderson v. Gessemer City, 470 U.S. 564 (1985) . 10-12, 14

Belle Terre v. Boraas, 416 U.S. 1, 13 (1974) 8

Bressman v. Gash, 131 N.J. 517, 529 (1993) 11

Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).....7, 8

Medical Realty v. Board of Adjustment, 228 N.J. Super 226, 233 (App. Div. 1988).....12

Pullan v. Township of South Plainfield Planning Board, 291 N.J. Super 1 (1996).....12

Pullen v. Township of South Plainfield Planning Board, 291 N.J. Super. 1, 6 (App. Div. 1996).....11

Regents of the University of Michigan v. Ewing, 474 U.S. 214, 225 (1985).....9

Shell Oil Co. v. Zoning Board of Adjustment, 127 N.J. Super 60 (App. Div.), rev 'd, 64 N.J. 134 (1974) 13, 14

Universal Camera Corp. v. National Labor Relations Bd., 340 US 474 (1950) 14

Statutes

28 U.S.C. § 1254 (1) 1

28 U.S.C. § 1291 2

28 U.S.C.S. § 1334 (a) 2

Constitutional Provisions

The U.S. Constitution, Amendment 5 1

The U.S. Constitiution, Amendment 14, Section 1 1

APPENDIX

Appendix A- Judgment In The United States Court Of Appeals For The Third Circuit, Dated July 2, 2001 ..... 1a

Appendix B- Opinion In The United States Court Of Appeals For The Third Circuit, Dated July 2, 2001 ..... 3a

Appendix C- Memorandum Opinion And Order In The United States District Court For The District Of New Jersey, Dated July 5, 2000 ..... 27a

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit, No. 00–2135, which appears at 256 F.3d 107 (2001), is reproduced at page 3a of Appendix B.

The unpublished Memorandum Opinion of the United States District Court for the District of New Jersey is reproduced at page 27a of Appendix C.

STATEMENT OF JURISDICTION

The Judgment sought to be reviewed was filed by the United States Court of Appeals for the Third Circuit on July 2, 2001 (No. 00-2135), in response to the Petitioner's appeal from the District Court's Order.

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1), which permits review by writ of certiorari "in any civil or criminal case, before or after rendition of judgment or decree."

CONSTITUTIONAL PROVISIONS

The U.S. Constitution, Amendment 5, provides in part:

> No person shall be . . . deprived of life, liberty, or peroperty, without due process of law. . . .

The U.S. Constitution, Amendment 14, Section 1, provides in part:

[N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

Jurisdiction of the Courts Below

The United States Court of Appeals for the Third Circuit, the order of which is sought to be reviewed in this Petition, had jurisdiction of this matter pursuant to 28 U.S.C. § 1291 ("Final decisions of district courts"), which states in part: "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . ."

The United States District Court for the District of New Jersey had jurisdiction over this case pursuant to Bankruptcy Rule 8001 and 28 USCS § 1334(a) ("Bankruptcy cases and proceedings"), which provides in part that "the district courts shall have original and exclusive jurisdiction of all cases under title 11."

Procedural History

On November 9, 1998, as part of a Chapter 11 proceeding in the United States Bankruptcy Court (Newark, New Jersey), the Honorable Novalyn L. Winfield, U.S.B.J., authorized the sale of commercial premises on Tonnelle Avenue, North Bergen, New Jersey, to the Respondent B.A.P.S. Northeast, Inc. ("BAPS"). The sale was contingent upon BAPS obtaining the required approval from the North Bergen Board of Adjustment to use the property as a Temple of worship.

BAPS applied to the North Bergen Board of Adjustment ("BOA") for a use variance and site plan approval. Hearings

were held before the BOA on January 6, February 3, April 7, September 22, October 6, and December 1, 1999.

In June, 1999, BAPS interrupted the BOA proceeding by filing a verified complaint in the United States Bankruptcy Court seeking a determination of automatic approval of the pending BOA application, allegedly because the BOA had failed to render a decision on the application within 120 days. In an Order dated September 27, 1999, Judge Winfield denied BAPS' application, remanded the zoning application to the BOA for a decision on the merits, and retained jurisdiction.

Hearings before the BOA then resumed. On October 6, 1999, the Board of Adjustment denied the use variance. On November 29, 1999, Judge Winfield reversed the BOA's denial of the variance application but remanded the case to the BOA for the limited purpose of consideration of imposing reasonable conditions relating to ingress and egress.

On November 24, 1999, the BOA filed a Notice of Appeal to the United States District Court.

On December 1, 1999, the BOA imposed on BAPS, as a condition to the judicial grant of the variance, the obligation to hire off-duty North Bergen police officers to direct traffic and monitor BAPS's compliance with the 505-attendees limitation during the hours of operation on Saturdays and Sundays.

On January 7, 2000, Judge Winfield vacated the BOA's variance condition and instead directed that BAPS provide "uniformed volunteer parking persons to control ingress and

egress to and from the parking lot and to assist worshipers in parking their vehicles."

BOA's appeal was dismissed by the Honorable Alfred M. Wolin, U.S.D.J., by Order dated July 6, 2000. On July 17, 2000, the BOA filed a Notice of Appeal to the United States Court of Appeals for the Third Circuit.

In a Judgment dated July 2, 2001, the Third Circuit affirmed the judgment of the District Court and taxed costs against the Petitioner.

Facts

BAPS, a religious sect based in India, applied on November 16, 1998, to the North Bergen Building Department for a certificate of occupancy to maintain a temple of worship and related educational and social facilities at commercial property located on Tonnelle Avenue in North Bergen, New Jersey. BAPS contracted to purchase the property, four and one-half acres of commercially zoned property, from Four Three Oh, Inc., a Chapter 11 debtor authorized by the November 9, 1998, Order of Judge Winfield to sell the property to BAPS. BAPS intended to convert a building on the tract of land, which formerly housed a night club and a seafood restaurant, to a Temple of Worship. The building contained approximately 19,000 square feet.

The BAPS's application required a use variance because the parcel of land is located in a zone that excludes places of worship and schools. Testifying before the BOA, Mr. Kiran J. Patel described BAPS as a nonprofit religious organization that "helps promote the family values, moral values, natural

values, and spiritual values." BAPS also provides social and educational activities for the young members.

The proposed temple would house activities beginning at 6:30 a.m. until as late as 6:30 p.m. Attendance on the weekends would increase considerably; 400 attendees are expected on Saturday as well as Sunday. Mr. Patel testified that he counted 195 parking spaces, which he believed would be sufficient to accommodate the 100 families that he expected to attend services. In response to the BOA's concerns about off-street parking and traffic flow into Tonnelle Avenue, Mr. Patel stated that up to 100 cars would enter and exit the property on Saturday and up to 140 cars on Sunday.

At a hearing on April 7, 1999, the BOA's licensed planner testified that BAPS required 200 parking spaces for the operation of its temple. He stated that BAPS had only 146 spaces. He considered this a serious deficit in the number of spaces needed, as it would result in problems of safety of access, overcrowding on the site, and traffic backups on the surrounding lanes and streets.

This prompted the BOA to hire a traffic consultant, Mr. Hal Simoff. He stated that the proposed temple would hold up to 1,600 persons on a given day, which would result in 500 cars entering and exiting the property. The impact of the 500 cars, he testified, "would be difficult to quantify because it's so bad." An overflow of cars onto neighboring streets "would be a serious mistake [and] . . . extremely dangerous." He concluded that BAPS really had only 129 available parking spaces.

On September 22, 1999, a traffic engineer employed by BAPS testified that on a given day more than 1,600 people were at a BAPS temple in nearby Edison, New Jersey. Five hundred cars spilled over grassy parking areas, which Edison had never approved for parking. He discovered that BAPS had been operating without a certificate of occupancy for years and had represented that only 1,000 persons would use the Edison facility. He also concluded that vehicles would have to wait an unacceptably long period of time to exit under the North Bergen temple onto Tonnelle Avenue.

On October 6, 1999, the BOA unanimously denied BAPS's use variance application on the ground that the substantial off-street parking deficit would have a serious impact on vehicles entering and exiting Tonnelle Avenue, a road that is heavily traveled seven days a week. Assuming a maximum occupancy of 700 persons, the BOA chairman concluded that a shortfall of 65 spaces would

> create a dangerous situation on Tonnelle Avenue. There is no place for these excess automobiles to go. They will be backing out onto Tonnelle Avenue. It will be a mess. They will be lined up on Tonnelle Avenue trying to get in.

The chairman also found that BAPS's offer to limit attendees to 578 persons would require 165 spaces, which would still result in a deficit of 30 spaces. If 505 people were to attend, BAPS would require 144 spaces, which the BOA's expert calculated would still leave it 15 spaces short.

In her November 16, 1999, decision, Judge Winfield reversed the BOA's denial of a use variance and gave the BOA

another opportunity to impose reasonable conditions to reduce or eliminate the ingress and egress problems.

The BOA met on December 1, 1999. It rejected BAPS's proposal to use its own volunteer members to direct traffic and monitor attendance to insure a maximum occupancy of 505 attendees. The BOA imposed an obligation on BAPS to pay for off-duty North Bergen police officers to direct traffic and monitor attendance on the weekends during hours of operation.

Judge Winfield later ruled that the BOA's condition was unreasonable and arbitrary and vacated it. The issue became moot, however, when BOA counsel informed Judge Winfield that the North Bergen Police Department had a chronic shortage of off-duty police officers willing to work on such assignments.

ARGUMENT

I.

THE THIRD CIRCUIT MISCONSTRUED DECISIONS OF THIS COURT WHEN IT SUBSTITUTED ITS JUDGMENT FOR THAT OF THE BOARD OF ADJUSTMENT IN FINDING THAT IT ACTED ARBITRARILY AND CAPRICIOUSLY

The Supreme Court first recognized in its landmark decision of *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), the principle that deference should be given to governmental judgments concerning proper land-use allocation. That deference is a principle that is necessary for the continued development of effective zoning and land-use control

mechanisms. *See Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (dissenting op.).

This Court has long recognized that "zoning is a complex and important function of the State" and perhaps may be "the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life." *Id.*

Provided state zoning action does not impair constitutional rights, this court has adopted an explicit deferential posture in reviewing local zoning decisions. Although dissenting for other reasons, Justice Marshall articulated this long standing judicial respect as follows:

> "I therefore continue to adhere to principal of Village of *Euclid v. Ambler Realty Co.*, 212 US 365 (1926) that deference should be given to government judgments concerning proper land use allocation. That deference is a principle which has served this court well and which is necessary for continued development of effective zoning and land use control mechanisms... and it is appropriate that we afford zoning authorities considerable latitude in choosing the means by which to implement such purposes". *Id.*, P.8

The Third Circuit appears to have overlooked these principles in this case. In reviewing the decision of the BOA, the court, rather than deferring to the local agency, examined in detail the process by which that agency ultimately refused to grant a variance to BAPS because of a shortage of parking spaces and anticipated traffic problems. After reviewing the

BOA's deliberative process, the court concluded, "The record shows little support for any of these concerns."

In reaching this conclusion, the court went well beyond its scope of review as established by the decisions of this Court in such cases.

This Court has recognized that the appropriate scope of substantive due process review for state and local land use actions requires the federal courts to "show great respect" for the local authority's "professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted . . . norms as to demonstrate that the [decisionmaker]. . . did not actually exercise professional judgment." *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 225 (1985).

In short, the Third Circuit ignored decisions of this Court that consistently have cautioned restraint when federal courts are asked to review the actions of local agencies, such as zoning boards. It substituted its judgment for the zoning board, despite the fact that the board comprises local residents who best understand the needs of the community and the dangers posed to a densely populated community by excessive traffic and inadequate off-street parking spaces.

II.

THE LOWER COURTS VIOLATED DUE PROCESS BY APPLYING DIFFERENT STANDARDS OF REVIEW AT DIFFERENT STAGES OF THIS CASE

The District Court below rejected the contention of the BOA that the court's appellate review of the BOA's decision

was governed by the arbitrary and capricious standard of review. In its decision, the District Court stated:

> The Board incorrectly argues that this Court should apply an arbitrary and capricious standard of review. In so arguing, the Board confuses the Court's standard of review over the Board's decision with the standard articulated above.
> (District Court Opinion, p. 7).

It is apparent that the District Court perceived two standards of review: one governing the Bankruptcy Court's review of the BOA's decision and another governing the District Court's review of the Bankruptcy Court's decision. This view contradicts case law that holds that due process requires the same standard of review to be applied as a case is subsequently appealed.

This Court enunciated this principle in *Anderson v. Gessemer City*, 470 U.S. 564 (1985). In *Anderson*, the Court was required to sort out two contradictory factual interpretations. One interpretation was made by the District Court, which was the court of original jurisdiction. The other interpretation was attributable to the Court of Appeals, which reviewed the District Court's findings. The Court framed the issue by stating that "the question we must answer, however, is not whether the Fourth Circuit's interpretation of the facts was clearly erroneous, but whether the District Court's finding was clearly erroneous." *Id.* at 577.

In other words, *Anderson* stands for the principle that the standard of review does not change as a case travels from one appellate court to another. In this case, the District

Court should not have disregarded the Bankruptcy Court's view of the BOA's decision and proceeded to determine whether the BOA's findings and conclusions were reasonably supported by credible evidence. If so, then the BOA's decision was not arbitrary and capricious and should have been affirmed. New Jersey case law is in agreement with *Anderson*. *See Pullen v. Township of South Plainfield Planning Board*, 291 N.J. Super. 1, 6 (App. Div. 1996). *See also Bressman v. Gash*, 131 N.J. 517, 529 (1993), in which the New Jersey Supreme Court explained:

> Bound by the same scope of review as the Law Division, our role is to defer to the local land use agency's broad discretion and to reverse only if we find its discretion to be arbitrary, capricious or unreasonable.

This arbitrary and capricious standard is the functional equivalent of the "clearly erroneous" standard. Both standards are intended to defer to the factual interpretations and judgments of the original tribunal. This Court described the clearly erroneous standard in this way:

> But when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error. . . . Application of the foregoing principles to the facts of the case lays bare the errors committed by the Fourth Circuit in its employment of the clearly-erroneous standard. In detecting clear error

> in the District Court's finding that petitioner was better qualified than Mr. Kincaid, the Fourth Circuit improperly conducted what amounted to a de novo weighing of the evidence in the record.

Anderson, supra, at 575-76.

As explained above, the clearly erroneous and arbitrary and capricious standards are functionally equivalent. Consistently employed in reviewing agency actions, this standard imposes

> [t]he heavy burden of proving that the evidence presented to the Board was so overwhelmingly in favor of the applicant that the Board's action can be said to be arbitrary, capricious of unreasonable.

Medical Realty v. Board of Adjustment, 228 N.J. Super. 226, 233 (App. Div. 1988).

In *Pullan v. Township of Sourth Plainfield Planning Board*, 291 N.J. Super. 1 (1996), the court explained:

> We do not review the wisdom of its decision, rather its decision " 'is presumed valid and should not be set aside unless it is arbitrary, capricious, or unreasonable.' . . . . The Board's factual conclusions are entitled to great weight and, like those of an administrative body, ought not be disturbed unless there is insufficient evidence to support them.". . . Indeed, planning boards, because of their familiarity and particular knowledge of the community's characteristics and interests, must be

> allowed wide latitude in the exercise of their delegated discretion.

Id. at 6-7.

This standard of review is easily understood but difficult to apply at times. For example, in *Shell Oil Co. v. Zoning Board of Adjustment*, 127 N.J. Super. 60 (App. Div.), *rev'd*, 64 N.J. 134 (1974), the trial court reversed the Board of Adjustment's denial of a variance for a gas station. The trial court determined that the applicant had presented sufficient evidence to prove that no permitted uses were feasible. The Appellate Division affirmed, but Judge Kolovsky's dissent is noteworthy:

> [T]he controlling question is not whether "there was sufficient competent evidence to show that *ie* would not be reasonable feasible to use the lot for any of the permitted uses." . . . Rather it is whether the evidence was such that it was arbitrary and unreasonable for the Board to find otherwise.

127 N.J. Super. at 66. Adopting the dissent, the Supreme Court of New Jersey upheld the Board's denial of the variance.

Agreeing with this analysis, the Third Circuit expressly found that the District Court did indeed employ the wrong review standard:

> In This Case, the Bankruptcy Court applied the correct deferential standard of review, but he District Court did not. (Third Circuit Opinion p. 3a)

The Third Circuit then proceed however, to patently misapply the correct standard by reviewing the evidence before the Board with the same colored lenses used by the District Court. Even a cursory reading of the Third Circuit and District Court analyses shows this. There is no substantial difference in the manner in which both Courts myopically selected testimony that favored the applicant while systematically ignoring testimony that supported the reasonableness of the Board's variance denial. A comparison of Judge Alito's dissenting analysis with that of the majority glaringly reveals just how little deference the majority used.

In sum, the Third Circuit actually employed the same admittedly incorrect review standard as did the District Court. This Court has indicated a willingness to intervene when the standard of review is misapprehended or grossly misapplied. *Universal Camera Corp. v. National Labor Relations Bd.*, 340 US 474 (1950).

This Court is respectfully urged to intervene here. It should not pass up an opportunity to reaffirm the need to maintain its tradition of protecting local zoning boards from improper interference by the courts.

Both the District Court and the Bankruptcy Court in this case ignored *Shell Oil* and proceeded to selectively make a case for BAPS. In violation of this Court's decision in *Anderson*, both appellate courts engaged in an impermissible *de novo* weighing of the factual findings of the BOA.

CONCLUSION

The undersigned respectfully requests that this Court grant certiorari in this matter for the reasons stated above.

Respectfully submitted,

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APPENDIX A – JUDGMENT IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, DATED JULY 2, 2001

No.00-2135

IN RE: FOUR THREE OH, INC.

Debtor

BOARD OF ADJUSTMENT OF THE TOWNSHIP OF NORTH BERGEN, THE,

Appellant

v.

B.A.P.S. NORTHEAST, INC.; MICHAEL B. KAPLAN, Chapter 11 Trustee; TOWNSHIP OF NORTH BERGEN, THE, a Municipal Corporation of the State of New Jersey; FOUR THREE OH CORP.

Appeal from the United States District Court
For the District of New Jersey
D.C. No.: 99-cv-06002
District Judge: Alfred M. Wolin

Submitted Under Third Circuit LAR 34.1(a) February 27, 2001

Before: NYGAARD, ALITO, and ROSENN, Circuit Judge.

JUDGEMENT

This cause came to be heard on the record from the United States District Court for the District of New Jersey and was submitted on February 27, 2001.

On consideration whereof, it is now here ORDERED AND ADJUDGED by this Court that the judgment of the District Court entered July 7, 2000, be, and the same is hereby affirmed. Costs taxed against appellant. All of the above in accordance with the opinion of this Court

ATTEST:

_____

Marcia M. Waldron, Clerk

Dated: 2 July 2001

Certified as a true copy and issued in lieu of a formal mandated on July 24, 2001

Teste: s/ Kathleen Broewse

Acting Clerk, United States Court of Appeals for the Third Circuit

APPENDIX B – OPINION IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, DATED JULY 2, 2001

No.00-2135

IN RE: FOUR THREE OH, INC.

Debtor

BOARD OF ADJUSTMENT OF THE TOWNSHIP OF NORTH BERGEN, THE

Appellant

v.

B.A.P.S. NORTHEAST, INC.; MICHAEL B. KAPLAN, Chapter 11 Trustee; TOWNSHIP OF NORTH BERGEN, THE, a Municipal Corporation of the State of New Jersey; FOUR THREE OH CORP.

Appeal from the United States District Court
For the District of New Jersey
D.C. No.: 99-cv-06002
District Judge: Alfred M. Wolin

Submitted Under Third Circuit LAR 34.1(a)
February 27, 2001

Before: NYGAARD, ALITO, and ROSENN,
Circuit Judges.

(Filed: July 2, 2001)

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OPINION OF THE COURT

ROSENN, Circuit Judge:

This appeal has its origin in BAPS's[1] application to the North Bergen Board of Adjustment ("BOA or "the Board")for a use variance which would permit BAPS to use the subject property as a temple for Hindu worship. BAPS had agreed to purchase the property from the trustee in bankruptcy for Four Three Oh, Inc. on the condition that it receive approval from the Township of North Bergen for its desired use. The application process dragged on for over two years, and finally culminated in the BOA's insistence that BAPS hire off-duty police officers to direct traffic and insure compliance with the occupancy limit for the temple set by the BOA. The Bankruptcy Court held that this condition was unreasonable and issued an injunction requiring the BOA to allow BAPS to use its own uniformed volunteers for traffic direction and occupancy limit compliance. The BOA appealed this order to the United States District Court for the

[1] BAPS is an acronym. The full name of the organization is Bochasanwasi Shree Akshar Purushottam Swaminarayan Sanstha.

District of New Jersey, which affirmed. The Board timely appealed to this Court. We also affirm.

I.

This controversy began in November of 1998, when the United States Bankruptcy Court approved the sale to BAPS of the subject property which previously had been owned by Four Three Oh, Inc., a debtor in Chapter 11 proceedings. The sale of the property, which had been used by the prior owner as a nightclub, was contingent upon BAPS obtaining permission from the BOA to use the land as a house of worship.

BAPS applied to the Township of North Bergen for a Certificate of Occupancy to permit the property to be used as a place of worship. Because the property is located in an industrial zone, the Township denied the application on the ground that a use variance was required under New Jersey law. BAPS then filed an application for the necessary use variance with the BOA, who scheduled the matter for a hearing in January, 1999.

Over the next several months, the BOA repeatedly postponed the hearing. As a result, the Chapter 11 trustee and BAPS jointly commenced an adversary proceeding in the Bankruptcy Court seeking an injunction requiring the BOA to grant BAPS's pending application for a variance. The Bankruptcy Court denied the injunction, but remanded the matter to the BOA for a hearing, ordering it to issue a final decision on the BAPS application by October 6, 1999.

The first remand hearing occurred on September 22, 1999. The BOA heard testimony from several experts, including Derrick McGrath, the BOA's engineer, who identified nu-

merous problems with the site that BAPS needed to address. Most of these problems were later discussed by BAPS's engineer, Bhaskar Halari, who explained that BAPS could and would remedy them. One of the chief problems McGrath identified was the fear that the property had insufficient parking spaces to accommodate its anticipated use. In response to this concern, Kishor Joshi, BAPS's architect, testified that BAPS was willing to limit the temple's occupancy based on the number of available parking spaces.

The number of parking spaces that would be available for worshippers' use is a matter of dispute. Part of the land on which the former nightclub was situated is currently leased to a fast food restaurant (Taco Bell). Although Taco Bell's lease is silent on the issue of parking, Michael Kauker, the North Bergen town planner, had previously testified that, based on the number of seats in Taco Bell, the restaurant was entitled to exclusive use of 27 parking spaces. Joshi accepted this conclusion and calculated that the temple would be left with 165 spaces. He offered to limit the occupancy of the temple to 3.5 persons per parking space, or 578 persons.

The BOA then heard testimony from Michael Maris, BAPS's traffic expert. He testified that he had studied the traffic conditions on the avenue adjacent to the property and, using a "peak load factor" of .9, he calculated that the property would have a C Level of Service,[2] acceptable under

[2] A property's "Level of Service" refers to the amount of time it takes a vehicle to exit the driveway. Level of Service A means a delay time of less than ten seconds. Level of Service F, which is generally unacceptable, means a delay time of greater than 50 seconds. The property currently operates with a "B" Level of Service.

Federal standards. Maris based this calculation on BAPS's agreement to limit itself to 165 parking spaces.

On September 28, 1999, the BOA heard testimony from its own traffic consultant, Hal Simoff. Using the same methodology as Maris, he concluded that the temple's driveways would operate unsafely, with a level of service rating of F. However, Simoff used a peak load factor of .7, which, on cross examination, he conceded was incorrect. He then agreed that a peak load factor of .82 would be more appropriate and would yield a D Level of Service, which Maris testified was still acceptable (under federal standards). Simoff later testified that, based on his reading of the metes and bounds description in the Taco Bell lease, Taco Bell was entitled to 65 parking spaces. Although it received notice of this litigation, Taco Bell never appeared or asserted any claim.

Between the second and final scheduled hearing dates, BAPS wrote a letter to the BOA offering to limit its occupancy to 505 persons, even though the number of available parking spaces would permit a building occupancy of 578 persons under the relevant North Bergen ordinance. Under the ordinance, a building with an occupancy limit of 505 required only 143 parking spaces.

The final hearing on the BAPS application took place on October 6, 1999. Simoff again testified at this hearing, but this time he limited his testimony to BAPS's existing facility in nearby Edison Township. Simoff claimed that BAPS had misrepresented its proposed use of that facility before the Edison land use board and that BAPS had made architectural changes to the Edison building without first obtaining the

requisite municipal approval. However, Simoff once again retracted his testimony on cross-examination when confronted with approved site plans for the Edison facility. These plans proved that BAPS had, in fact, obtained the approval of the township before altering its building.

At the end of the final hearing, the BOA denied BAPS's application for a variance, citing occupancy, traffic, and parking problems. BAPS appealed this decision to the Bankruptcy Court, which reversed the denial, concluding that the Board had acted arbitrarily in refusing to consider reasonable restrictions that would alleviate problems with occupancy, parking, ingress and egress. The Court remanded the application back to the Boar d to consider such restrictions.

On remand, the BOA required, as a condition of granting the variance, that BAPS hire off-duty police officers to monitor traffic entering and exiting its parking lot. This condition was financially burdensome and, as it turned out, impossible to fulfill, because the chief of police later informed BAPS that off-duty officers were not available. The BOA refused BAPS's offer to have its own volunteers perform this function, and BAPS once again brought the matter to the attention of the Bankruptcy Court. This time, the Court held that this condition was arbitrary and unreasonable. It vacated the proposed condition and ordered BAPS's application for a variance approved, allowing BAPS volunteers to monitor the traffic flow in the temple parking lot. The BOA appealed this order to the District Court, which affirmed.

II.

The first question before us is whether the District Court applied the correct standard of review. The District Court reviewed the bankruptcy court's factual findings for clear error, while subjecting its legal conclusions to plenary review. Although this is the standard that normally applies to appeals from bankruptcy decisions, *see In re Sharon Steel Corp.*, 871 F.2d 1217, 1223 (3d Cir . 1989), this case reached the District Court in an unusual procedural posture. The Bankruptcy Court had effectively reviewed the decision of the Board of Adjustment, an administrative body created under state law. Under similar circumstances, the Court of Appeals for the Eight Circuit explained the standard of review as follows:

> [W]e are reviewing neither the legal rulings of the bankruptcy court nor its findings of fact. W e are reviewing the judgment of a district court affirming a bankruptcy court decision giving effect to a decision of the [administrative agency]. In substance, we are reviewing the decision of an administrative agency.
>
> *Id.* at 1390 (internal citations omitted).

When a federal court reviews a decision of a state agency, it must grant that agency's factual findings the same degree of deference to which they would be entitled if they were reviewed by a state court. *See AT&T W ireless PCS v. Winston-Salem Zoning Board*, 172 F .3d 307, 315 (4th Cir. 1999). If the BOA's decision had been reviewed in the state court system, the Law Division of the New Jersey Superior

Court would have exercised a deferential standard of review. Its review would have been limited to determining whether the BOA's decision was supported by "substantial evidence" and whether it was "arbitrary, unreasonable or capricious." *Pullen v. S. Plainfield Planning Bd.*, 291 N.J. Super 303, 311-12, 677 A.2d 278, 282 (Law Div. 1995)("Pullen I"). The Law Division would have acted as a reviewing court, not a trial court, and would have reviewed the BOA's factual findings based on the record of the proceedings before the BOA. *See Pullen I*, 291 N.J. Super at 312.

On appeal, the Appellate Division's review of the Law Division's decision would have been de novo. The Appellate Division would have conducted its own review of the record before the BOA, using the same arbitrary and capricious standard. *See Pullen v. Township of S. Plainfield Planning Bd.*, 291 N.J. Super. 1, 6, 676 A.2d 1095, 1097(App. Div.1996)("*Pullen II*").

In this case, the Bankruptcy Court applied the correct, deferential standard of review, but the District Court did not. When the Bankruptcy Court's decision was appealed to the District Court, the District Court functioned as a second-level reviewing court. Its standard of review should have been plenary. *See, e.g. AT&T Wireless*, 172 F.3d at 314-315; *C.K. v. New Jersey Dept. of Health & Human Services*, 92 F.3d 171 (3d Cir. 1996); *Bankruptcy Estate of United Shipping v. General Mills*, 34 F.3d 1387 (8th Cir. 1994).

In similar cases in which the District Court, functioning in an appellate capacity, applied the wrong standard of review,

we have nevertheless reached the merits of the appeal.[3] In light of the already long duration of this litigation in the court below, we will not remand but decide the merits. For reasons fully discussed hereinafter, we believe the record of the BOA proceedings reveal that it acted arbitrarily, capriciously and unreasonably in denying the variance sought by BAPS. As we explain in Part III, the District Court did not err in affirming the decision of the Bankruptcy Court.

III.

Under New Jersey law, a town planning board should grant a variance for a proposed land use that is "inherently beneficial" if the applicant satisfies a four -prong test. *See Sica v. Board of Adjustment of the Township of Wall*, 127 N.J. 152, 165-66 (1992). The parties here agree that the proposed temple constitutes an "inherently beneficial" use of the subject property. Accordingly, the *Sica* decision requires the BOA to first identify the public interest involved and then identify the "detrimental effect that will ensue from the grant of the variance." *Id.* at 165-66. Next, the Board should, when possible, consider reasonable conditions on the use that would reduce its detrimental effect. *See id.* Finally, the Boar d should "weigh the positive and negative criteria and determine whether , on balance, the grant of the variance would cause a substantial detriment to the public good." *Id.* In do-

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[3] *See, e.g., In re Marcus Hook Dev. Park, Inc.*, 943 F.2d 261, 263 n.2 (3d. Cir. 1991)(finding that the District Court had applied the wrong standard of review when reviewing a Bankruptcy Court's decision and proceeding to reach the merits of the appeal); *In re Vertientes, Ltd.*, 845 F.2d 57, 58 & 59-60 (3d Cir. 1988)(same).

ing so, the Board should reduce the weight of the negative criteria to the extent that their effect could be reduced by the imposition of reasonable conditions. *See id.*

We agree with the District Court and the Bankruptcy Court that the Board failed to seriously undertake the balancing test required by *Sica*. The BOA cited three negative criteria to support its denial of the variance alleged overuse of the BAPS facility in Edison, a shortage of parking, and traffic problems. The record shows little support for any of these concerns. First, as the Bankruptcy Court noted, there is no evidence in the record, except for Simoff's discredited testimony, to support the allegation that BAPS misrepresented its anticipated use to the Edison board.

The Board also relied on Simoff's admittedly faulty analysis to support the conclusion that BAPS's proposed use of the site would cause traffic problems. Simoff himself conceded that the peak load factor used by BAPS's traffic expert, which led to the conclusion that the Temple would not unduly hamper traffic, was more appropriate than the one he used, and would yield an acceptable Level of Service. Thus, we agree that the Board's reliance on Simoff's traffic calculations was unreasonable.[4]

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[4] The dissent contends that Simoff 's error in calculation "related only to the ability of cars to exit the proposed temple's parking lot, leaving unaffected any conclusions about . . . the ability of cars to enter the lot." (Dis. op. at 16). However, Maris testified that the ability of vehicles to exit the site was the most critical consideration in analyzing the feasibility of the proposed use. He stated that, because cars attempting to enter the proposed lot only need to make a right turn off Route 1 and 9, "the entering traffic is not

Furthermore, the Temple's peak hours of operation would fall on Sunday evenings from four to nine p.m. According to Maris's uncontradicted testimony, which was based on his personal knowledge and study of local traffic conditions, Route 1 & 9 is not heavily trafficked during those hours. Maris testified that the traffic problems on Routes 1 & 9 occur during weekday commuter hours. Although BAPS does offer services during those hours, its experience at its Edison facility reflects that week-day services are sparsely attended, usually drawing only 10-15 worshipers.

Finally, the Board's concern about parking also lacks a foundation. Here, again, the Board relied on the testimony of Simoff, a non-lawyer, who opined that, based on his reading of the Taco Bell lease, Taco Bell was entitled to 65 parking spaces. The lease, however, is silent on the issue of parking.[5] Moreover, Simoff's testimony was contradicted by that of North Bergen's own town planner, who testified that Taco Bell needed only 27 spaces, which would leave BAPS with more than enough parking for a temple with an occupancy limit of 505. Finally, we note that, four years ago, this Board approved the use of this very site as a nightclub. Although the nightclub's occupancy limit was 700, the Board expressed no concern over the amount of available parking.

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critical." He also testified that the number of vehicles attempting to enter the parking lot at the peak entering hour was far lower than the number of cars attempting to exit at the peak exiting hour. Neither of these conclusions has been contradicted.

[5] We also note that, although Taco Bell has received notice of the existing action, it has not appeared to defend its right to any parking spaces.

The existence of this prior approval calls into question the genuineness of the BOA's contention that it denied the BAPS application due to inadequate parking.[6]

Even if there were some factual basis for the concerns articulated by the Board, we would still affirm the judgment of the District Court because the Board shirked its duty under Sica to seriously consider conditions designed to alleviate any negative impact that would flow from the grant of the variance. The record reveals that BAPS proposed numerous conditions,[7] from reducing the size of its prayer hall to re-

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[6] The dissent asserts that the BOA approved the use of the site as a nightclub because a nightclub attracts patrons "late at night when street parking may be more available and traffic flow is lighter." (D.C. at 18) This is pure speculation. Nothing in the record suggests that parking on Route 1 and 9 is available late at night, but not on Sunday evenings. Moreover, contrary to the dissent's suggestion, Maris testified that entry into and exit from the parking lot would be more evenly spread throughout the temple's hours of operation than would entry to and exit from a church or synagogue. He stated that, at BAPS's temple in Edison, "people kept coming in throughout the day."

[7] The dissent believes that it was reasonable for the BOA to question whether BAPS would be willing to turn people away at the door once 505 people had entered the temple if there was room for more. (Dis. op. at 17). On the contrary, it is unreasonable and unfair for the BOA to postulate in the absence of any evidence that BAPS would violate its agreement to limit occupancy. Occupancy limits are quite common in dance halls, dining rooms, elevators and other structures. Besides, if BAPS were to violate this condition of the variance, the Township has a legal remedy by injunction or rescission of the variance.

ducing the occupancy limit of its temple, which should have quieted the Board's concerns about over-use, parking and traffic. The Board rebuffed all of these proposals for no apparent reason. Its president simply concluded that "no organization would voluntarily limit its membership."

Finally, we also note that the Bankruptcy Court vacated the condition that the Board ultimately chose to impose on BAPS's use of the site, the hiring of off-duty police officers at BAPS's expense to direct traffic and monitor compliance with the occupancy limit. We agree with the Bankruptcy Court that this condition was arbitrary and unreasonable. The Board refused to allow BAPS's own volunteers to direct traffic and monitor occupancy, concluding that they could not be trusted to do so. We believe that this conclusion, which has no basis in the record, further supports the Bankruptcy Court's decision that the Board acted arbitrarily and unreasonably in denying the variance.

IV.

In sum, we agree with the Bankruptcy Court that the Board acted arbitrarily and unreasonably. The judgment of the District Court will be affirmed. Costs taxed against appellant.

ALITO, Circuit Judge, dissenting:

I respectfully dissent for two reasons. First, unlike the majority, I do not think that the decision of the Board of Adjustment ("BOA") denying the variance was arbitrary or capricious. Second, I do not believe that the Bankruptcy Court's Opinion vacating the condition that the BOA ulti-

mately chose to apply -- the hiring of off-duty police officers -- is properly before us for review.

I.

The New Jersey Legislature has delegated the power to grant or deny variances to local boards of adjustment. See N.J. Stat. S 40:55D-70. However, the Legislature has restricted that power in the following manner:

> No variance or other relief may be granted under the terms of this section, including a variance or other relief involving an inherently beneficial use, without a showing that such variance or other relief can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance.

N.J. Stat. S 40:55D-70(d) (2000).

In other words, a board must deny a variance if it finds either that the variance would ultimately result in a "substantial detriment to the public good" or that the variance would "substantially impair the intent and purpose of the zone plan and zoning ordinance." In this case, the BOA unanimously found that denial of BAPS's application was mandated by the parking and traffic problems that granting the variance would cause. P.A. 451.

"Review of the decision of a board of adjustment . . . begins with the recognition that the board's decision is presumptively valid and is reversible only if arbitrary, capricious, and unreasonable. Underlying the presumption is

the recognition that such boards possess special knowledge of local conditions and must be accorded wide latitude in the exercise of their discretion." *Sica v. Bd. Of Adjustment*, 127 N.J. 152, 166-67, 603 A.2d 30, 37-38 (1992) (citations omitted). "[A] reviewing court [may not] 'suggest a decision that may be better than the one made by the . . . planning board,' we merely 'determine whether the board could reasonably have reached its decision.'" *Pullen v. Township of S. Plainfield Planning Bd.*, 291 N.J. Super. 1, 6-7, 676 A.2d 1095, 1097 (App. Div. 1996) (quoting *Davis Enters. v. Karpf*, 105 N.J. 476, 485, 523 A.2d 137, 141 (1987)). Moreover, the bur den on a party is even greater when challenging the denial of a variance than when challenging the approval of a variance. *See Nynex Mobile Communications Co. v. Hazlet Township Zoning Bd. of Adjustment*, 276 N.J. Super. 598, 609, 648 A.2d 724, 730 (App. Div. 1994) (citing *Cerdel Constr . Co. v. Township Comm.*, 430 A.2d 925 (1981)). "Thus, an applicant bears a heavy burden in overcoming a denial." *Id.*

The majority rejects the BOA's two main reasons for denying the variance--a shortage of parking and traffic problems--holding that "[t]he record shows little support for . . . these concerns." Maj. at 8. The record, however, contains more than sufficient evidence for the BOA's decision to withstand review.

BAPS does not contend that it was inappropriate for the BOA to consider parking and traffic problems in making its decision on the variance. See *Price Co. v. Zoning Bd. of Adjustment*, 297 N.J. Super. 327, 331-32, 652 A.2d 784, 787 (Law. Div. 1993). Nor does BAPS contend that the BOA acted unreasonably in refusing to grant its application for a

variance as it was initially presented to the BOA. Rather, BAPS challenges the BOA's refusal to accept its proposal to limit occupancy to 505 people as a solution to the detrimental effects of the proposed temple--a temple still capable of accommodating 1500-1600 people.[1] P.A. 253.

Under the *Sica* test, the BOA was first required to "reduce the detrimental effect [of granting the proposed variance] by imposing reasonable conditions on the use . . . . [and] then weigh the positive and negative criteria and determine whether, on balance, the grant of the variance would cause a substantial detriment to the public good" *Sica*, 127 N.J. at 166, 603 A.2d at 37. The BOA r ejected the proposed occupancy limit as an invalid "reasonable condition on the use" for three reasons. The BOA determined (1) that the proposed conditions did not sufficiently eliminate the parking and traffic problems; (2) that BAPS would be unable to impose the proposed conditions effectively; and (3) that BAPS would be unlikely to adhere to the proposed conditions. Each of these reasons is supported by substantial evidence and thus provides an adequate basis for the BOA's denial of the variance.

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[1] Notably, while BAPS proposed to limit the occupants to 505 people and to rearrange the interior of the temple so that the prayer hall would be suitable for 505 people, BAPS never offer ed to reduce the overall square-footage of the temple, which would still remain capable of holding 1500-1600 people. The majority apparently holds that the BOA's decision to focus on the gross square footage of the temple rather than on the square footage of the prayer hall alone was arbitrary and capricious. I find no support for the conclusion that no reasonable person could focus on the gross capacity of the temple.

i.

First, the BOA reasonably found that, even with the occupancy limit of 505, the proposed BAPS temple would cause a substantial detriment to the public good with respect to parking and traffic. *See Price Co. v. Zoning Bd. of Adjustment*, 279 N.J. Super. 327, 328-29, 652 A.2d 784, 785 (Super Ct. 1993).

Testifying about parking, the BAPS expert, Michael Maris, and the BOA's expert, Hal Simoff,[2] agreed that the temple would need one parking space for approximately every 3.3 occupants. P.A. 131; 264. Thus, the temple would need 153 spaces to accommodate 505 people. The parking lot that the proposed temple site shares with a Taco Bell has a total of 193 spaces. Therefore, if Taco Bell owns only 27 spaces, as BAPS contends, there was enough parking for 505 people; conversely, if Taco Bell owns 64 spaces, as the BOA contends, then enough parking does not exist.

The only testimony as to the number of parking spaces that Taco Bell owns came from Simoff, who opined, based on his examination of the Taco Bell lease and his measurements of the property, that Taco Bell owns 64 spaces. P.A. 261-62. BAPS's figure of 27 spaces is based entirely on the testimony of Town Planner Michael Kauker, who stated that Taco Bell "could use 27 spaces" – which meant that the zoning laws would be satisfied if Taco Bell had a minimum of 27 spaces. P.A. 11-12. This fact has little logical relation-

[2] The BOA hired Simoff to study the parking and traffic effects of the proposed temple and to make an independent recommendation on whether the variance should be granted.

ship to the number of spaces that Taco Bell owns and thus does not undermine Simoff's testimony.

The majority dismisses Simoff's testimony on this point partly because he is not a lawyer and because Taco Bell has "not appeared to defend its right to a certain number of parking spaces." Maj. at 9 fn.5. Simoff's lack of a law degree was a fact that the BOA could have considered in assessing the weight to assign to his opinion, but this fact did not make it unreasonable for the BOA to accept his testimony. Moreover, I fail to see the significance for present purposes of Taco Bell's failure to appear in the federal court proceedings. Taco Bell is not bound by the decision in this case, and it is not difficult to think of business reasons why it might have chosen not to appear.

As for traffic, Simoff and Maris disagreed over the ability of Route 1 & 9, a state highway, to absorb the traffic that the temple would generate. The BOA President reasonably worried that Route 1 & 9 "is a heavily trafficked road . . . .It will be a mess. [Cars] will be lined up on[Route 1 & 9], trying to get in.". P.A. 447. Another BOA member noted that when discussing "[Route] 1 & 9, you're talking a state highway. It's treacherous. Exiting and entering anywhere on [Route 1 & 9] for one car, you're taking your life in your hands." P.A. 448-49.

The BOA heard conflicting expert testimony on the impact that the proposed temple would have on traffic. Simoff testified that the traffic volume along Route 1 & 9 at the temple site during peak midday hours was 1600 vehicles/hour. P.A. 228. He further testified that the temple would generate 168 vehicles/hour exiting during peak time.

P.A. 231. According to Simoff's computer modeling, under these conditions, Route 1 & 9 at the temple driveway would operate at Level of Service F.[3] P.A. 236. Simoff characterized this level of service as "unacceptable under any conditions." P.A. 237.

Maris agreed that Level of Service F is unacceptable, but he testified that, with the temple, the Level of Service would be "C" -- a negative impact of only one service level from its current service level of "B." P.A. 144-45. Maris characterized this as "an acceptable impact on traffic." P.A. 145.

The majority holds that it was unreasonable for the BOA to accept Simoff's testimony because, on cross- examination, Simoff admitting making a minor error in calculation. The main difference between Simoff's conclusion and Maris's came from their use of different "peak hour factors"[4] -- Simoff testified that he used a peak hour factor of .7 in his calculations, P.A. 292, while Maris testified that he used a peak hour factor of .91. P.A. 148. Simoff admitted on cross-examination that the correct peak hour factor was .82--barely

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[3] Planners refer to "Levels of Service" when measuring the traffic flow of a road and its corresponding ability to accept traffic entering from a driveway or connecting roadway. Level of Service A means that the average delay for a vehicle waiting to enter is less than 10 seconds per vehicle, and Level of Service F means that the delay is greater than 50 seconds per vehicle. P.A. 144-45; 236-37.

[4] The "peak hour factor" is a factor used in the calculation of a road's level of service. The peak hour factor compensates for the fact that cars will not attempt to exit a driveway uniformly throughout the peak hour. P.A. 149.

closer to that used by Maris than to that used by Simoff. P.A. 293-94. Nevertheless, using the correct peak hour factor, Simoff calculated the entryway would still be classified as Level of Service D. P.A. 294.

Weighing witness credibility is the province of the BOA,[5] and the BOA was entitled to accept Simoff's opinion despite his initial error. Simoff admitted that neither he nor Maris used the correct peak hour factor in their application, and that the real peak hour factor lay somewhere in between, only slightly closer to Maris's number than to his own. Moreover, the error would not have changed his ultimate conclusion. Lastly, the error in calculation related only to the ability of cars to exit the proposed temple's parking lot, leaving unaffected any conclusions about the capacity of the parking lot or the ability of cars to enter the parking lot. Under these circumstances, Simoff may have been slightly "discredited," as the majority claims, but I do not believe that it was unreasonable for the BOA to accept any of Simoff's testimony, as the majority effectively holds. *See Todd v. Sheridan*, 268 N.J. Super. 387, 400, 633 A.2d 1009, 1016 (App. Div. 1993) ("The finder of fact is free to accept all, some, or none of an expert witness's opinion."). Moreover, accepting Simoff's revised testimony, I do not believe that the Board unreasonably decided that a decrease from Level of Service B to Level of Service D constituted a substantial detriment to the public good.

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[5] *See Beverly Calif. Corp. v. NLRB*, 227 F.3d 817, 830 (7th Cir. 2000); *Hambsch v. Department of the Treasury*, 796 F.2d 430, 436 (D.C. Cir. 1986); *Baghdikian v. Bd. of Adjustment*, 247 N.J. Super 45, 48-49, 588 A.2d 846, 848 (App. Div. 1991).

ii.

Second, the BOA reasonably questioned whether BAPS could adhere to the proposed restriction. The BOA President worried that "it would not be feasible to tell a person that he or she could not attend services." P.A. 448. This concern is neither arbitrary nor capricious. Under *Sica*, the BOA is required to consider only "reasonable conditions." *Sica*, 127 N.J. at 166, 603 A.2d at 37. A condition that is not feasible certainly does not qualify as a reasonable condition.

The majority does not address the specifics of how BAPS will prevent more than 505 people from attempting to come to services. If the number of cars coming to the temple site exceeds the number of parking spaces, it is predictable that some people who wish to attend services and who know that there is space for them in the temple will park their cars illegally on adjoining streets and then walk to the temple. This would create a very dangerous situation. P.A. 227-28.

Simoff recommended that the variance be granted if BAPS would reduce the square footage of the temple to a size suitable for an occupancy of approximately 450 people. P.A. 299 & 398-400. However, none of BAPS's proposals show a willingness to reduce the size of the temple. Thus, even if enough parking existed on the site for an occupancy limit of 505, it was not unreasonable for the BOA to reject the limitation of occupancy as not being a "reasonable condition."

iii.

Third, the BOA reasonably questioned whether BAPS would adhere to the proposed restriction. The BOA President

doubted whether BAPS "would voluntarily limit its membership." P.A. 448. It was reasonable for the BOA to question whether BAPS would be willing to turn people away at the door once 505 people had entered the temple, even though there would still be room for 995 to 1095 attendees.

In questioning BAPS's willingness to do this, the BOA only partially relied on Simoff's testimony regarding the alleged over-occupancy of BAPS's temple in Edison. The BOA President made the common-sense comment that "I, for one, do not believe that any organization would voluntarily limit its membership." P.A. 447. In other words, he doubted BAPS's willingness to turn away people who wished to enter the temple to worship even though there was plenty of room for them inside. This view was well within the bounds of reason.

The majority questions the BOA's sincerity because the BOA previously granted a variance for the operation of a nightclub on the same property. Maj. at 9. However, as far as I am aware, BAPS itself has never questioned the BOA's motives. I would view this case quite differently if there were any suggestion that the BOA harbor ed any bias towards BAPS or its members, but I am aware of no such evidence. Furthermore, the parking and traffic concerns associated with a nightclub can be very different from those associated with a house of worship. The temple's main services would be on Sunday, with other services on weekday afternoons. *See* P.A. 177-78 (BAPS's schedule of services). A nightclub would normally draw patrons only late at night, when parking may be more available and traffic flow is lighter. Also, it is likely that the arrival and departure of patrons of a nightclub would be more evenly spaced over its

hours of operation, whereas the proposed BAPS temple could generate mass entry and exodus at specific times. In any event, we do not have before us the record concerning the BOA's previous grant of a variance, making it impossible to draw conclusions as to propriety of an analogy between the nightclub and the proposed temple.[6]

II.

I also note that the BOA's later decision to impose the condition of hiring off-duty police officers at BAPS's expense to monitor traffic is not properly before us. The BOA imposed the condition on December 1, 1999, a week after filing the notice of appeal to the District Court in this case. The Bankruptcy Court subsequently vacated the condition on January 7, 2000. The BOA has not appealed that decision, nor does it raise the issue in its brief. *See* Brief of Appellant at 14 (disavowing a challenge to the Bankruptcy Court's order vacating the condition). Indeed, the majority's conclusion that there is nothing in the record to support the condition is self-evident, since the Boar d was ordered by the Bankruptcy Court to begin considering reasonable conditions on November 29, 1999, whereas we have no record before us

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[6] The Majority implies that it was per se unreasonable for the Board to rely upon common knowledge as well as its weighing of the credibility of the BAPS petitioners to reach the conclusion that BAPS would probably not adhere to the occupancy limit. Maj. at 9 n.7. If this were the case, then it would form the basis for a blanket rule that, no matter how preposterously low the proposed occupancy limit was when compared to the designs of and intended use for the building, a Board of Assessment must accept a petitioners proposed occupancy limit. This cannot be the case.

concerning any BOA actions or meetings occurring after October 9, 1999.

III.

In sum, the majority disregards the long-standing proposition that "[a]n abuse of discretion does not exist simply because we disagree with the [finder of fact's] decision." *Barnes Foundation v. Township of Lower Merion*, 242 F.3d 151, 167 (3d Cir. 2001) (Nygaard, J., dissenting). " 'Abuse' itself is a serious accusation and in using the term 'abuse' to define our standard of review, our jurisprudence has recognized the institutional superiority of the [finder of fact]. Therefore, we should not readily discard its findings and conclusions." *Id.*

Because I believe that the BOA's decision is supported by substantial evidence and is not arbitrary or capricious, I would reverse the decision of the District Court and sustain that of the BOA.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX C – MEMORANDUM OPINION AND ORDER IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, DATED JULY 5, 2000

Civil Action No. 99-6002

IN RE: FOUR THREE OH, INC.,

Debtor.

BOCHASANWASI SHREE AKSHAR PURSHOTTAM SWAMINARAYAN SANSTHA-NORTHEAST, etc.,

Plaintiff-Appellee,

and

MICHAEL B. KAPLAN, CHAPTER 11 TRUSTEE,

Counterclaimant,

v.

THE TOWNSHIP OF NORTH BERGEN, et al.,

Defendant-Appellant.

MEMORANDUM OPINION

This matter is before the Court on the appeal of defendant/appellant, the Board of Adjustment of the Township of North Bergen (the "Board"), from the decision of the United States Bankruptcy Court. The Board claims that the Bankruptcy Court erred in finding that the Board arbitrarily and capriciously refused to grant an application for zoning variance and site plan approval south by plaintiff/appellee

Bochasanwasi Shree Akshar Purushottam Swaminarayan Sanstha- Northeast ("BAPS"). The appeal has been decided upon the written submissions of the parties pursuant to Federal Rule of Civil Procedure 78. For the reasons set forth below, the Court will affirm the decision of the Bankruptcy Court, and the appeal will be dismissed.

BACKGROUND

As will be discussed more fully, below, the Court will affirm the Bankruptcy Court for substantially the same reasons wet for the in the oral opinion of the Bankruptcy Judge, the Honorable Novlayn L. Wynfield. Familiarity with that opinion and the facts of this case is assumed. Therefore, the Court will only set forth the facts which are necessary to decide this appeal.

This case involves a municipal zoning board's denial of an application that sought to convert an existing night-club/restaurant to a religious temple of worship -- a Hindu church. The Bankruptcy Court determined that the Board's denial of BAPS' application was arbitrary and capricious and ordered the application approved. The Board now seeks this Court's review of the lower court's opinion and order.

In November 1998, the Bankruptcy Court entered an order that permitted the sale of the subject property to BAPS to allow, *inter alia,* payment of creditors. The Bankruptcy Court's involvement was necessary because the property at issue was the principal asset in a debtor-in-possession's Chapter 11 bankruptcy estate.

Soon after the Bankruptcy Court permitted the sale, BAPS applied to the Township of North Bergen for a Certificate of

Occupancy to permit the subject property's use as a temple of worship. The property, however, was located in an "I zone" which is note zoned for places of worship. Therefore, the Township formally denied the BAPS application on the grounds that a use variance was required. After BAPS initiated efforts to obtain the necessary variances, it filed a formal application before the Board which scheduled the matter for hearing in January 1999.

Over the next several months, the Board caused several delays and postponements of the hearings. As a result, on July 20, 1999 BAPS and the Chapter 11 Trustee jointly initiated an Adversary Proceeding in the Bankruptcy Court by filing a Verified Complaint seeking an injunction requiring the Board to grant its pending application for a use variance and site plan approval. The Bankruptcy Court denied the injunction but remanded to the Board for further hearings and ordered a decision on the BAPS application no later than October 6, 1999.

At the remand hearings, the parties discussed several issues pertinent to the issuance of the variance. These issues included, *inter alia,* parking for the temple and the resultant traffic.

At the first remand hearing, the Board expressed concerns regarding parking and parking overflow. BAPS, however, attempted to alleviate any concern regarding these issues. Indeed, BAPS indicated that it would limit the temple's occupancy based upon the parking available to it. When the Board's planner claimed that a fast food restaurant at the same site ("Taco Bell") required a minimum of 27 parking space, BAPS agreed that 27 spaces could be dedicated for

Taco Bell's exclusive use. thus, BAPS offered to use only the remaining portions of the parking lot -- 165 spaces (when restriped). Accordingly, by applying the North Bergen Ordinance standard of one parking space per 3.5 church auditorium seats, BAPS offered to limit its occupancy to 578 people.

BAPS also offered the testimony of its traffic expert, Michael Maris ("Maris"). Maris discussed traffic counts performed at the North Bergen property, as well as another BAPS facility located in Edison, New Jersey. His analysis took into account BAPS' agreement to limit itself to the available 165 parking spaces. Based on the traffic counts, Maris concluded that the property's driveways would operate at a Level of Services "C" rating, an acceptable level of operation within the federal highway standards.

At the final two remand hearings, the Board presented the testimony of its traffic consultant, Hal Simoff ("Simoff"). Simoff purportedly reviewed the files concerning BAPS' Edison facility. Based on his claim to have reviewed Edison's municipal files, Simoff suggested that the proposed North Bergen temple would receive more people and cars than BAPS represented; thus, he concluded that traffic flow would be unacceptable.

On cross-examination, however, Simoff conceded that he used inaccurate figures. He acknowledged that he employed an incorrect peak load factor and agreed that the peak load factor utilized by Maris was closer to the correct figure.

Although Simoff had no apparent legal training, he also testified that the Taco Bell was entitled to 65 spaced, no the 27 spaces previously claimed by the Board's planner.

Finally, Simoff testified that, at the Edison facility, BAPS made exterior architectural modifications without first receiving municipal approvals. Again, BAPS cast doubt on the reliability of his testimony. On cross-examination, Simoff was presented with approvals an site plans that he claimed did not exist. Simoff claimed he "didn't see" these material during his investigation.

Also as the final remand hearing, BAPS, in an effort to alleviate the Board's perceived concerns, proposed to reduce the prayer hall to an area of 3,540 square feet and limited occupancy to only 505 persons. Accordingly, BAPS only required 143 parking spaces.

Despite the flaws in Simoff's testimony, the Board unanimously voted to deny BAPS' application. In doing so, the Board cited such reasons as traffic safety and insufficient parking.

As noted above, the Bankruptcy Court found that the Board arbitrarily and capriciously denied BAPS' application. The Board now appeals the Bankruptcy Court's ruling.

DISCUSSION

I. Standard of Review

On appeal, a federal court may set aside a bankruptcy court's findings of fact only if clearly erroneous. *See, e.g., Brennan v. Poritz,* 198 B.R. 445, 448 (D.N.J. 1996); *In re Sharon Steel Corp.,* 871 F.2d 1217 (3d Cir. 1989); *General*

Elec. Credit Corp. v. Nardulli & Sons, Inc., 836 F.2d 184 (3d Cir. 1988). The fact that a reviewing court could have decided the matter differently does not render a finding of fact clearly erroneous. *See* Bank. R. 8013: *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985). In contrast, a bankruptcy court's legal conclusions or questions of law are subjected to plenary review. *See, e.g., In re Modular Structures, Inc.*, 27 F.3d 72, 76 (3d Cir. 1994) (*citation omitted*); *J.P. Fyfte, Inc. v. Bardco Supply Corp.*, 891 F.2d 66, 69 (3d Cir. 1989).

When reviewing a matter committed to the bankruptcy court's discretion, the district court may only determine whether the bankruptcy court did or did not abuse its discretion. *See* Bank. R. 8013; *see also In re Vertientes, Ltd.*, 845 F.2d 57, 59 (3d Cir. 1988). Further, this Court is limited to review of the evidence before the Bankruptcy Court and which was made a part of the record at the time the November 16, 1999 decision was rendered. *See, e.g., Mellon Bank, N. A. v. Delaware & Hudson Ry. Co.*, 129 B.R. 388, 396 (D. Del 1991) (*citing In re Neis*, 723 F.2d 584, 589-90 (7th Cir. 1983) (holding that a district court should not ordinarily engage in additional fact-finding on appellate review of a bankruptcy Court order)). Accordingly, in deciding the current appeal, this Court will disregard any pleadings not in the record before the Bankruptcy Court, in addition to any facts not supported by citations to the record.

The Board incorrectly argues that this Court should apply an arbitrary and capricious standard of review. In so arguing, the Board confuses the Bankruptcy Court's standard of review over the Board's decision with the standard articulated above.

Nevertheless, the Bankruptcy Court's standard of review is relevant to the Court's inquiry. Indeed, the Court will consider whether the Bankruptcy Court applied its appropriate standard of review through the prism of the Court's standard of review.[1]

II. The Bankruptcy Court's Standard of Review

The Board also maintains that the Bankruptcy Court applied an inappropriate standard of review. The Court disagrees.

The Bankruptcy Court properly acknowledged and applied the "arbitrary and capricious" in its review of the Board's decision. Under this standard, a court should not reverse a Board of Adjustment's decision unless its actions were arbitrary and capricious. *See Pullen v. Township of South Plainfield Planning Board,* 291 N. J. Super. 1, 6 (App. Div. 1996); *Medical Realty Assocs. v. Board of Adjustment of Summit,* 228 N. J. Super. 226, 233 (App. Div. 1988). "[W]hile the words 'arbitrary and capricious' may sound harsh, they are simply the standard of appellate review in particular cases." *Anastasio v. Planning Board of West Orange Township,* 209 N. J. Super 499, 522 (App. Div. 1986).[2]

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[1] The Court notes that even if it applied the arbitrary and capricious standard it would still reach the same result.

[2] Moreover, purely legal determinations re subject to *de novo* review.

As demonstrated below, the court below did not err in applying this standard.[3]

III. *Sica* Balancing Test

A. *Sica v. Board of Adjustment of Wall*

The New Jersey legislature and the New Jersey Supreme Court have set forth specific requirements necessary to obtain a variance. Under the governing law, where a proposed use is "inherently beneficial," a board should grant a variance if an applicant satisfies a four prong test. *Sica v. Board of Adjustment of Wall,* 127 N. J. 152, 165-66 (1992).[4] This four-prong test, known as the *Sica* balancing test, balances both positive and negative criteria relating the variance.

Under this test, the board of adjustment should first identify the public interest. *See id.* at 165. Second, the board should identify the "detrimental effect that will ensue from the grant of the variance." *See id* at 166. Third, the board

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[3] The Bankruptcy Court also appropriately acknowledged its obligation to review the record as developed before the Board. *Willoughby v. Planning Bd. of Deptford,* 306 N.J. Super. 266, 274 (App. Div. 1997). The Board, however, maintains that the lower court did not have the entire record before it. The board points out that it did not have the board's formal written resolution.

The Board's argument is unavailing. The formal written resolution only contains those facts within the record. Here, the Bankruptcy Court reviewed the entire record, including all of the transcripts, corresponding exhibits, and the Boards' oral ruling.

[4] The parties do not dispute that the proposed temple is "inherently beneficial."

should reduced detrimental effect by imposing reasonable condition on the use. *See id.* Lastly, the board should "weigh the positive and negative criteria and determine whether, on balance, the grant of the variance would case a substantial detriment to the public good. *Id.*

B. The Board Acted Arbitrarily and Capriciously

The Board failed to adequately apply the *Sica* factors to the facts of this case. Moreover, the Board had little factual basis for its denial. As the Bankruptcy Court correctly noted, "the Board simply concluded that reasonable condition could be imposed and further concluded that no organization can voluntarily limit its use." Accordingly, the Bankruptcy Court properly found that the Board's decision was arbitrary and capricious.

Construing the Board's ruling in a favorable light, the Board identified three purportedly negative criteria as a justification for the denial of the application. The purported negative elements included (1) occupancy at the Edison site, (2) traffic, and (3) parking. Reliance on these elements, however, was unreasonable because little to no evidence supported the negative inferences.

As to the occupancy issue, the Board relied on Simoff's assertions regarding occupancy at the Edison site. Simoff suggested that BAPS misrepresented its occupancy expectations to the Edison board of adjustment and will likely do the same before the North Bergen Board.

This argument is of no moment. The Court agrees with the Bankruptcy court -- no evidence support Simoff's testimony as to this issue. Indeed, upon a complete review of the rec-

ord, nothing suggests that BAPS will not abide by agreed upon occupancy requirements.[5]

With regard to the traffic issue, the Board similarly relied on Simoff's faulty analysis. Indeed, Simoff acknowledged that in making his finding, he employed an incorrect peak load factor. In fact, he apparently conceded that the peak load factor utilized by BAPS' expert, Maris, was more appropriate.

Moreover, even it Simoff's analysis was valid, the Board incorrectly compared the temple's traffic generation with that of a currently out-of-business restaurant. Instead, the Board should have compared the Temple's estimated traffic with what existing approved uses would generate. *See Children's Ins. v. Verona Township Bd. of Adjustment,* 290 N. J. Super. 350, 357-58 (App. Div. 1996).

Lastly as to the parking issue, the Board again relied upon the opinion of Simoff. As noted above, Simoff concluded that Taco Bell was entitled to 64 parking spaces. From this number, he concluded that insufficient parking was available to BAPS. Not only was this number inconsistent with the Town Planner's conclusion (allotting 27 spaces to Taco Bell), but Simoff was unqualified to give this legal opinion.[6]

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[5] Simoff also failed to consider the discrepancies in size and use between the Edison temple and the proposed North Bergen temple.

[6] The Board also appears to argue that BAPS did not meet its burden in proving that Taco Bell required 27 parking spaces. To the contrary, BAPS relied upon and agreed with the Town Planner that Taco Bell could use 27 spaces.

Indeed, the lease is silent as to Taco Bell's entitlement and Simoff has not qualifications to offer such testimony.

Even assuming the purported negative criteria relied upon by the Board held weight, the Board failed to consider the reasonable conditions proposed by BAPS. Specifically, BAPS, in an effort to reduce the detrimental effects of the Temple, agreed to make certain changes requested by the Town; BAPS further agreed to reduce occupancy to 505 and parking to 143. While the Board had no duty to itself proposed reasonable conditions, this Court agrees with the Bankruptcy Court's finding that the Board was obligated to entertain BAPS' proposals under *Sica's* step three. *See Sica,* 127 N. J. at 163-166. The Board failed to do so; indeed, nothing in the record suggests that the Board considered BAPS' proposal to limit occupancy and parking requirements. Instead, the Board merely relied on Simoff's testimony and concluded that no "organization would voluntarily limit it's membership." Absent the proper consideration by the Board, BAPS could not prove to the Board that the variance would not impair the intent and purpose of the zoning ordinance. *See New Brunswick Cellular Tel. Co. v. South Plainfield Bd. of Adjustment,* 305 N. J. Super. 151, 165 (App. Div. 1997).

Further, nothing in the record suggests that the Board balanced the positive and negative criteria, let alone seriously considered BAPS' proposed conditions. Thus, for this reason alone, the Board failed comply with *Sica. See Sica,* 127 N. J. at 163 ("A too-strict reading of the negative criteria can result in the denial of many deserving inherently beneficial uses, which should have the right to locate on any appropriate site where the physical impact of their operations can be

alleviated to an reasonable extent by the imposition of suitable conditions and restrictions." (internal quotation omitted.))

Accordingly, the Court reiterates its agreement with the Bankruptcy Court -- the Board's decision was arbitrary and capricious. The Court will affirm the decision below.

CONCLUSION

For the reasons set forth above, the Opinion and Order of the Bankruptcy Court granting the plaintiff's motion will be affirmed and the appeal will be dismissed. An appropriate Order it attached.

Dated: July 5, 2000

S/ Alfred M. Wolin

ALFRED M. WOLIN, U.S.D.J.

Civil Action No. 99-6002

IN RE: FOUR THREE OH, INC.,

Debtor.

BOCHASANWASI SHREE AKSHAR PURSHOTTAM SWAMINARAYAN SANSTHA-NORTHEAST, etc.,

Plaintiff-Appellee,

and

MICHAEL B. KAPLAN, CHAPTER 11 TRUSTEE,

Counterclaimant,

v.

THE TOWNSHIP OF NORTH BERGEN, et al.,

Defendant-Appellant.

ORDER

In accordance with the Court's Memorandum Opinion filed herewith,

It is on this 5th day of July, 2000

ORDERED that the Opinion and Order of the Bankruptcy Court granting the plaintiff's motion is affirmed and the appeal is dismissed.

ALFRED M. WOLIN, U.S.D.J.